IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 60.

REVEREND E. S. EVANS, et al.,
Petitioners,

v.

GUYTON G. ABNEY, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia.

RESPONDENTS' REPLY TO MEMORANDUM OF THE UNITED STATES OF AMERICA.

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INTRODUCTION.

The Solicitor General of the United States filed a memorandum in support of Petitioners, and counsel for Respondents received a copy of the memorandum on Saturday, November 8, 1969. This response to the memorandum is filed pursuant to permission granted by the Court dur-

ing the course of oral argument on Thursday, November 13, 1969.

Substantially all of the contentions made by the Solicitor General (the "Government") have also been made by Petitioners, and consequently we have already considered them in our main brief. Thus, a detailed response to the Government's memorandum is not necessary. There are, however, several observations which should be made.

First, the Government clearly overstates the significance of this case as it relates to "the enforcement of racially restrictive stipulations and grants establishing charitable trusts."[1] As the record so plainly shows, the racial condition in Senator Bacon's will has **not** been "enforced", but, the exact opposite has occurred for the Georgia Court recognized that the racial condition could not be enforced. The charitable trust questions which might have been present in **Evans v. Newton**, 382 U. S. 296 (1966), are not present here for the trust has failed and, with reversion, the property has been removed from the public sphere. Clearly this is not a case which involves "race discrimination in our public life".

RESPONSE TO ARGUMENT.

The Government begins its argument by stating that the ultimate question is whether the park will be closed and the property returned to the heirs, or will be opened up to Negroes. While, generally speaking, that may be a correct statement of the effect of a decision one way or the other, it is certainly not the question that was passed upon by the Supreme Court of Georgia. Rather, the ques-

[1] We submit, though, that a reversal of the decision of the state court would indeed transform this case into one of significance because of the effect it would have upon the relationship between the state and federal judicial systems, and in particular upon the role of state courts in deciding questions of state law.

tion was whether under state law, in the light of the controlling impact of **Evans v. Newton**, *supra*, the purpose of Bacon's trust had failed with a resulting reversion of the property. The state court decision was not based "on the ground of race" as the memorandum states, but on the basis of applying settled principles of state law in the light of this Court's holding in **Evans v. Newton**, *supra*.

Boiled down, the essence of the Government's argument is that the Supreme Court of Georgia erred in its determination and application of state law. They would have this Court substitute its judgment for that of the highest court of a state as to what result was required under the law of the state. That this is so clearly illustrated by their attempt to enumerate the so-called "options" that were available to the Court.

They argue first that the restrictive provision might have been treated "as not written". Under what provision of law? The law of Georgia (and presumably of all other states) is that in determining the intent of a testator a court must look to the instrument as a whole, and it cannot ignore or treat as surplusage any part of a will if that result reasonably can be avoided. See **3 Redfearn, Wills and Administration in Georgia**, Section 142 (3d ed. 1965). Applying settled rules of construction under Georgia law, the Georgia Court construed the purpose of Bacon's will as being to create a trust solely and exclusively for the benefit of the white persons of the community and found that this purpose was impossible of attainment in view of the holding in **Evans v. Newton**, *supra*. Such a conclusion was mandated by the plain meaning of Bacon's will and a holding to the contrary would have been in direct conflict with Georgia law.

It is next suggested that reversion might be declined on the ground that the park has been "irrevocably dedi-

cated to the public". The answer to this argument, of course, is that the record in the case shows no dedication factually and the State Supreme Court further found, as a matter of state law, that there had been no such dedication. Whether or not Georgia property has been dedicated to the public under Georgia property law is peculiarly a matter to be decided by Georgia courts. As this Court stated in **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276 (1946):

> "**We do not question the state court's determination of the issue of 'dedication'.** That determination means that the corporation could if it so desired, entirely close the sidewalk and the town to the public and is decisive of all questions of state law which depend on the owner's being estopped to reclaim possession of, and the public's holding title to, or having received an irrevocable easement in, the premises." (66 S. Ct. at 278) (Emphasis supplied.)

Finally, the argument that the "cy pres principle" should have been applied does particular violence to state law. Under Georgia law (and presumably the law of all states) cy pres is not applied as a matter of course in every instance of charitable trust failure.[2] Instead, it may be applied only where a testator has evinced a general charitable intention, and the prescribed **mode** of accomplishing this charitable purpose has failed. Here, what has become impossible of accomplishment is not simply a "mode" of fulfilling a more general charitable purpose,

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[2] "It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases, as we shall see, it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose becomes impossible of accomplishment. In such a case the cy pres doctrine is not applicable." IV Scott, Trusts, Sec. 399 at 2825 (2d ed. 1956).

but instead, as the Georgia Supreme Court stated, "(T)he sole purpose for which the trust was created has become impossible of accomplishment."

There is absolutely no basis for any suggestion that the decision in the case at bar is in any way inconsistent with, or contrary to, prior decisions of the Georgia Courts. A will, of course, is *sui generis* and it is rare indeed when will construction cases involve identical facts or issues. However, the basic principles of law which are applied in such cases are constant, and we submit that an examination of prior Georgia decisions which involved the construction or application of the Georgia law of cy pres readily reveals that the decision of the Georgia Supreme Court in the instant case is completely consistent with prior decisions of the Georgia courts.

While Georgia courts have from time to time applied cy pres, they have done so only when the facts before them warranted its application. No Georgia court has ever applied cy pres where there was an absence of a general charitable intention, or where the application of cy pres would result in the property being put to a use of which the testator stated he disapproved.

It is significant that the Government, in discussing the "options" available to the Georgia court, did not cite a single Georgia case and referred only obliquely, and in a general way, to two code sections. The Government characterized the supposed options as being "each **apparently** consistent with local law." (Emphasis supplied.) The Supreme Court of Georgia has held that none of these options is consistent with Georgia law, and, to the contrary, they are all inconsistent. Surely this Court will not see fit to accept the unsupported conclusions as to Georgia law found in the memorandum in preference to the solemn adjudication of the highest court of that state, whose decision was reached following consideration of complete

briefs and oral arguments submitted by counsel for Petitioners and Respondents. Such a course, we submit, would inevitably lead to a destruction of the state judicial systems.

Lacking any real ground on which to bring the Fourteenth Amendment into play, the Government attempts to overcome this hurdle by implying that the members of the Georgia Supreme Court were not concerned with construing Bacon's will in accordance with Georgia law, but instead were motivated solely by a desire to "avoid" integration, and chose as their "method" the closing of a "public park". Such a contention is both an unjust reflection upon the members of the state court, and a gross and unwarranted distortion of the record and the facts in this case.[3]

The Governmet cites **Gomillion v. Lightfoot**, 364 U. S. 339 (1960), in support of the contention that State action has operated to deny "public benefits on the ground of race".[4] **Gomillion** is hardly relevant to the issues before this Court; however, the citing of this case by the Government does point up one of the underlying fallacies in its argument. The Government approaches the role of the state court in this case as though it possessed the same prerogatives and options which are available to legislative bodies. A legislative body, while operating within a framework of law, has significant leeway in exercising dis-

[3] The position of the Government is even more untenable when one considers the fact that the public parks in Macon are open to all citizens of the community and the decision of the court below could hardly be construed as having any effect upon integration in the public sphere. This is obviously not a situation where a community has chosen to close all of its parks, swimming pools, schools, etc., for the sole purpose of avoiding integration.

[4] **Gomillion** involved an attack upon an act of the Alabama legislature, the rather obvious purpose of which was to remove substantially all of the Negro Citizens from the city limits of Tuskegee, Alabama and thus deny them the right to vote.

cretion and deciding and implementing matters of policy. A court, on the other hand, must apply the law as it finds it to the facts in the case before it, regardless of the results which obtain, and regardless of whether or not the members of the court are of the opinion that a different result would better serve the general welfare of the community. Simply stated, the only "option" available to the Georgia court was that of construing the will in accordance with Georgia law.

There is one other brief comment which should be made with respect to the role of the state court in this case. The Government states that reversion did not occur automatically but that it took "the active participation of an agency of the State". In a very limited sense, "active participation of an agency of the State" is required before any reverter, express or implied, can ever occur, absent agreement of all concerned, since a controversy as to reverter can only be settled finally by a court decree. But that is the full extent of the participation of the Georgia courts in this instance. As pointed out in our main brief, the absence of an express reverter clause in Bacon's will is immaterial under Georgia law. Georgia Code, Section 108-106 (4) provides that where an express trust fails for any reason, a resulting trust is implied for the creator of the trust or his heirs. Once the Georgia Court recognized that the trust had failed, the property did revert to Bacon's heirs by "operation of law", namely by the application of the Georgia Code Section binding upon the state court. The state court had no choice but to follow the law.

In conclusion, we would simply restate our firm conviction that the decision of the Supreme Court of Georgia involved nothing more than the construction of a Georgia will in accordance with Georgia law, and no rights guaranteed Petitioners by the Fourteenth Amendment have been violated.

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in our main brief, we respectfully submit that the judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

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